

# Texas Law Review

## *See Also*

Volume 95

### Essay

## Filling the Texas Federal Court Vacancies

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Texas confronts many federal appellate and district court openings, but the situation has reached crisis proportions. The state addresses two protracted U.S. Court of Appeals for the Fifth Circuit vacancies, which have lacked nominees for multiple years, and eleven open trial court seats, all but one classified as “judicial emergencies.” This conundrum persists, although the Senate confirmed three jurists for Texas district vacancies in both 2014 and 2015 and President Barack Obama submitted well qualified, mainstream nominees on five empty posts in March 2016. Texas Republican Senators John Cornyn and Ted Cruz also failed to expeditiously provide those designees’ “blue slips,” a necessary precondition for Judiciary Committee arrangement of hearings. These candidates finally received a September hearing, which proceeded smoothly, but the panel never arranged a committee vote. Moreover, eight openings lacked nominees throughout last year, while the Texas senators’ processes that marshaled candidates for administration consideration did not begin, or were moribund, on a few in 2016, so that no more choices received nomination that year. 2016 as well was a presidential election year when confirmations traditionally slow or halt. These phenomena impose detrimental effects, particularly related to justice’s delivery. Because the circumstances recently became desperate, they require scrutiny.

The piece first surveys the history of modern appointments complications and the Texas vacancy crisis. It ascertains that expanding caseloads, increasing appellate and district court judgeships, and rampant partisanship have clearly undermined selection efforts across the country and Texas, which is ground zero for the “confirmation wars.” Because the paper’s analysis of the current situation detects that the nation and Texas confront prolonged open slots, which erode prompt, inexpensive, and

equitable case resolution, the last section proffers future suggestions, mainly for President Donald Trump and the 115th Senate.

### I. Modern Selection Difficulties

The background warrants limited discussion here, as the pertinent history has been canvassed elsewhere,<sup>1</sup> while the present state of affairs is most relevant. One essential notion is the persistent vacancies dilemma, which resulted from enhanced federal court jurisdiction, dockets, and judgeships.<sup>2</sup> The other salient facet, the modern vacancy concern, is political and can be ascribed to conflicting White House and Senate party control which started thirty-five years ago.

#### A. *Persistent Vacancies*

Congress enlarged jurisdiction in the 1960s,<sup>3</sup> criminalizing much behavior and recognizing numerous causes of action, elements which increased district court filings and concomitant appeals.<sup>4</sup> Congress mainly treated the rises by expanding judicial positions.<sup>5</sup> Over the fifteen years after 1980, confirmation times mounted.<sup>6</sup> For instance, appellate nominations consumed twelve months, confirmations consumed three months, and both grew.<sup>7</sup> Conditions acutely worsened later. For example, circuit nominations devoured twenty months while appointments reached six in 1997, the earliest year of Bill Clinton's last term, and 2001, the first year of George W. Bush's commencing administration.<sup>8</sup>

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1. *E.g.*, Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319 (1994); MILLER CTR. OF PUB. AFFAIRS, IMPROVING THE PROCESS FOR APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996).

2. The persistent vacancies complication deserves less assessment; delay is essentially intrinsic, resists felicitous solution, and has been comprehensively analyzed elsewhere. Bermant et al., *supra* note 1; Comm. on Fed. Courts, *Remedying the Permanent Vacancy Problem in the Federal Judiciary: The Problem of Judicial Vacancies and Its Causes*, 42 REC. ASS'N B. CITY N.Y. 374 (1987).

3. See MILLER CTR. OF PUB. AFFAIRS, *supra* note 1, at 3; Carl Tobias, *The New Certiorari and a National Study of the Federal Appeals Courts*, 81 CORNELL L. REV. 1264, 1270 (1996).

4. *E.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

5. 28 U.S.C. § 44 (2012); see S.1385, 113th Cong. (2013). See generally *Archive of Judicial Vacancies*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> [https://perma.cc/CX8R-HWA9].

6. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995).

7. See Bermant et al., *supra* note 1, at 329 (finding, between 1979 and 1992, the average vacancy-to-nomination time to be 344 days and the average nomination-to-confirmation time to be 75 days).

8. *E.g.*, Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the*

The process's many convoluted steps and number of participants make some delay inevitable.<sup>9</sup> Presidents consult home state elected officials, pursuing advice regarding submissions. Certain politicians deploy selection panels that vet aspirants while suggesting competent applicants. The FBI performs intensive "background checks." The ABA evaluates and rates choices.<sup>10</sup> The Justice Department might help screen aspirants while preparing nominees for Senate review. The Judiciary Committee assesses prospects, stages hearings for candidates and carefully discusses them, and votes; those reported may have upper-chamber debates, when needed, preceding floor ballots.

### B. *The Contemporary Dilemma*

Article II intimates that senators might confine unwise administration choices, while politics has suffused appointments.<sup>11</sup> However, partisanship cascaded when Richard Nixon vowed to enhance "law and order" by designating "strict constructionists,"<sup>12</sup> growing prominently after U.S. Court of Appeals for the District of Columbia Circuit Judge Robert Bork's Supreme Court fracas.<sup>13</sup> Politicization soared, while divided government

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*Federal Courts*, 39 U. RICH. L. REV. 871, 904–08 (2004); Orrin Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J. L. & PUB. POL'Y 1035 (2009). Each of those years resembled Obama's first year and his final two years.

9. Bermant et al., *supra* note 1; Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations But Will He Have a Dickens of a Time Living up to Them?*, FORUM, no. 1, 2009, at Article 9.

10. MILLER CTR. OF PUB. AFFAIRS, *supra* note 1; see ABA, STANDING COMM. ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983); see also *infra* note 156 and accompanying text (Trump Administration decision to eschew pre-nomination ABA evaluations and ratings).

11. THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (J.E. Cooke ed., 1961); see MICHAEL GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 28 (2000); SHELDON GOLDMAN, PICKING FEDERAL JUDGES LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 6 (1997).

12. GOLDMAN, *supra* note 11, at 198; DAVID O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY TASK FORCE ON JUDICIAL SELECTION 20 (1988). Trump, as presidential candidate and President, has analogously pledged to increase law and order. Casey Quinlan, *Trump Signs Three New "Law and Order" Actions at Jeff Sessions' Swearing In*, THINK PROGRESS (Feb. 9, 2017), <https://thinkprogress.org/jeff-sessions-swearing-in-95a9d10204c5> [<https://perma.cc/C5AS-5G9F>]; Josh Zeitz, *How Trump is Recycling Nixon's "Law and Order" Playbook*, POLITICO (July 18, 2016), <http://www.politico.com/magazine/story/2016/07/donald-trump-law-and-order-richard-nixon-crime-race-214066> [<https://perma.cc/VXL2-Q6UL>]; see Yamiche Alcindor, *Minorities Worry What a "Law and Order" Trump Presidency Will Mean*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/12/us/politics/minorities-worry-what-a-law-and-order-donald-trump-presidency-will-mean.html> [<https://perma.cc/RTU8-FYWJ>].

13. See JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18–20 (2007). For additional evaluation of Judge Bork's nomination and that confirmation process's aftermath, see generally MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992).

and the hope that the party lacking the White House would capture it and select jurists fostered procrastination.

Rather slow nominations may explain confirmations' dearth. In early 1997 and 2001, Clinton and Bush mustered relatively few circuit nominees and opponents criticized some.<sup>14</sup> Politicians who tendered applicants often stalled the pace.<sup>15</sup> Bush's minimal consultation limited selection,<sup>16</sup> and negligible GOP review of Clinton aspirants might have driven paybacks.<sup>17</sup> The Judiciary Committee shared responsibility, because the panel slowly analyzed, conducted hearings, and voted on people.<sup>18</sup> However, over 1997 and 2001, few candidates secured approval due to resource constraints and politics, specifically ideological disagreements.<sup>19</sup> Related pressing business and unanimous consent, which allows one member to stop ballots, prevented numerous chamber votes.<sup>20</sup>

### C. Texas

Texas manifested both aspects of the national concern. For example, swift population growth, instigated by a vibrant economy and mounting immigration, exponentially increased district filings coupled with appeals;

14. Press Release, White House, Office of the Press Sec'y, President Clinton Nominates 22 to the Federal Bench (Jan. 7, 1997), <https://www.gpo.gov/fdsys/pkg/WCPD-1997-01-13/pdf/WCPD-1997-01-13-Pg33.pdf> [<https://perma.cc/34C8-GF8C>]; Remarks Announcing Nominations for the Federal Judiciary, 37 WEEKLY COMP. OF PRES. DOC. 724 (May 9, 2001).

15. GOP senators demanded input, even sending names. Neil A. Lewis, *Clinton Has Chance to Shape the Courts*, N.Y. TIMES (Feb. 9, 1997), <http://www.nytimes.com/1997/02/09/us/clinton-has-a-chance-to-shape-the-courts.html> [<https://perma.cc/X9F2-QMAW>]; see 143 CONG. REC. 4,254 (Mar. 19, 1997) (statement of Sen. Biden).

16. David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, BALT. SUN (May 10, 2001), [http://articles.baltimoresun.com/2001-05-10/news/0105100112\\_1\\_senate-democrats-appeals-court-confirmation-process](http://articles.baltimoresun.com/2001-05-10/news/0105100112_1_senate-democrats-appeals-court-confirmation-process) [<https://perma.cc/39BS-E3HM>]; see Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 234 (2006).

17. Paul A. Gigot, *How Feinstein is Repaying Bush on Judges*, WALL STREET J. (May 9, 2001), <http://www.wsj.com/articles/SB989369905566856183> [<https://perma.cc/74MV-KPD7>]; Neil A. Lewis, *Party Leaders Clash in Capitol Over Pace of Filling Judgeships*, N.Y. TIMES (May 10, 2002), <http://www.nytimes.com/2002/05/10/us/party-leaders-clash-in-capitol-over-pace-of-filling-judgeships.html> [<https://perma.cc/S2EW-BQQ5>].

18. Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 742 (1997) (furnishing one circuit-nominee hearing every month when Congress was in session); 143 CONG. REC. 4,254 (Mar. 19, 1997) (statement of Sen. Biden) (furnishing two circuit-nominee hearings a month across 1987–94).

19. Tobias, *supra* note 18, at 744; Neil A. Lewis, *Bush and Democrats in Senate Trade Blame for Judge Shortage*, N.Y. TIMES (May 4, 2002), <http://www.nytimes.com/2002/05/04/us/bush-and-democrats-in-senate-trade-blame-for-judge-shortage.html> [<https://perma.cc/38MS-ZWA6>].

20. Jennifer Bendery, *Republicans Still Find Ways to Stall Judicial Nominees Despite Filibuster Reform*, HUFFINGTON POST (Feb. 10, 2014), [http://www.huffingtonpost.com/2014/02/08/republicans-judicial-nominees\\_n\\_4748528.html](http://www.huffingtonpost.com/2014/02/08/republicans-judicial-nominees_n_4748528.html) [<https://perma.cc/87DW-GWJ7>]; *infra* note 84 and accompanying text.

therefore, judgeships rapidly escalated to nine circuit and fifty-two district seats.<sup>21</sup> Rising politicization correspondingly subverted the process by stalling approvals.<sup>22</sup> However, certain parameters ameliorated some particular difficulties which suffuse the Texas appointments process. For instance, Lloyd Bentsen (D) cooperated with Republicans John Tower and Phil Gramm, who created a selection panel, and Ronald Reagan had a chamber majority his first six years which promoted appointments, while even once Democrats captured the Senate they astutely collaborated.<sup>23</sup> Joe Biden (D-Del.), who ably chaired the judiciary panel, attempted to confirm all superb, consensus picks, and the chamber approved High Court Justice Anthony Kennedy and six circuit jurists in 1988.<sup>24</sup> Bush *père* and his son had many Texas contacts, who assisted with confirmation of judges, and both knew quite a few prospects; the Texas senators appeared to efficaciously predict openings, speedily proffering submissions, especially over the Bush years.<sup>25</sup> In Clinton's tenure, the GOP enjoyed a majority the

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21. Judgeship legislation, which multiplied Texas judicial positions, witnesses these propositions. *E.g.*, Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978); Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). I rely substantially here and below on *John Cornyn and Ted Cruz's Texas: A State of Judicial Emergency*, ALLIANCE FOR JUST. (Sept. 6, 2016), <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> [https://perma.cc/G66C-V8L7]; Anisha Singh et al., *Update: Texas, Where Are the Judges?*, CTR. FOR AM. PROGRESS (May 5, 2016), <https://www.americanprogress.org/issues/civil-liberties/report/2016/05/05/136422/update-texas-where-are-the-judges/> [https://perma.cc/G4G4-DGGJ]. The privacy needs of many candidates, numerous Senate and House members, and the White House frustrate efforts to offer a complete picture.

22. *See supra* notes 14–20 and accompanying text. Politicization was gradual, worsening significantly after Bork. Nonetheless, even later, cooperation occurred. *See infra* notes 23–27 and accompanying text; *see also* CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE* 74–77 (2006).

23. 143 CONG. REC. 4,254 (Mar. 19, 1997) (statement of Sen. Biden); *see* GOLDMAN, *supra* note 11, at 285.

24. Bork was an exception. *See* GITENSTEIN, *supra* note 13; TOOBIN, *supra* note 13, at 18. When Reagan left office, Texas had three Fifth Circuit (one a newly created post) and two (1988) district vacancies. *Archive of Judicial Vacancies: Year 1988*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/1988> [https://perma.cc/AQD4-HPJE].

25. Each Bush named many state court judges. Biden cooperated with *père*; when George H.W. Bush left office, Texas had three Fifth Circuit (one created 1990), and ten district (seven created 1990), vacancies. *Archive of Judicial Vacancies: Year 1992*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/1992> [https://perma.cc/YH5Q-6AMG]. When Bush left office, Texas had one (2008) district vacancy. *Archive of Judicial Vacancies: Year 2008*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2008> [https://perma.cc/A9T5-QHAD]; *see* John Council, *Bench Scouts: Texas Impressed by Quality of Candidates Vetted by Senator's Committee*, TEX. LAW., Oct. 8, 2001, at 1; Natalie Knight, *Texas Judicial Vacancy Flood Means Cornyn, Cruz Must Act*, STAR-TELEGRAM (Aug. 26, 2015), <http://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article32481486.html> [https://perma.cc/5F4Q-NEZG].

last term and a half, while his predisposition to send very capable, moderate nominees and compromise—and the Texas lawmakers’ coordination—allowed the process to function comparatively well.<sup>26</sup>

In short, appointments were recently checkered, although a few periods have yielded rather successful confirmation endeavors. Illustrations were the Bush presidencies, even though the situation gradually worsened after Bork’s perilous fight until 2009, when it deteriorated.<sup>27</sup>

## II. Obama Administration Judicial Selection

### A. *Obama’s First Six Years*

Selection performed relatively well in Obama’s first six years when Democrats possessed a chamber majority. He aggressively consulted home-state elected officers, particularly Republicans, seeking, and normally following, proposals of superior, mainstream, diverse nominees.<sup>28</sup> These efforts promoted cooperation, as legislators in states having vacancies receive deference because they can halt the process through retaining blue slips.<sup>29</sup> Even with assiduous cultivation of the political actors, many have not in fact cooperated, declining to expeditiously suggest accomplished, consensus people.<sup>30</sup>

The GOP actually collaborated with routine hearings yet “held over” discussions and committee votes a week for all but one in sixty-plus strong, moderate circuit prospects.<sup>31</sup> Republicans slowly agreed on picks’ chamber debates, when necessary, and ballots, relegating superb centrists to languish across weeks until Democrats pursued cloture.<sup>32</sup> The GOP also sought

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26. When Clinton left office, Texas experienced four district vacancies (two posts created Dec. 2000). *Archive of Judicial Vacancies: Year 2000*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2000> [https://perma.cc/ERU2-FEBF]; see John Council, *Frost Aims to Fill Vacancies Despite Lame Duck Clinton*, TEX. LAW., Jan. 18, 1999, at 8.

27. See *supra* notes 13, 22, 25 and accompanying text; see also GEYH, *supra* note 22.

28. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239–40, 2253 (2013); see Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Obama’s First Term Judiciary*, JUDICATURE, July–Aug. 2013, at 7, 8–17.

29. Goldman et al., *supra* note 28, at 16–18; Ryan Owens et al., *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347; Tobias, *supra* note 28, at 2242.

30. Some politicians recommended few or none. Goldman et al., *supra* note 28, at 17; ALLIANCE FOR JUSTICE, *supra* note 21.

31. S. Judiciary Comm., *Results of Exec. Business Mtg.* (Mar. 22, 2013); see Tobias, *supra* note 28, at 2242–43.

32. Goldman et al., *supra* note 28, at 26–29; Tobias, *supra* note 28, at 2243–46; Matthew Yglesias, *Hillary Clinton Will Likely Have a Unique Chance to Remake the Federal Judiciary*, VOX (Aug. 22, 2016), <http://www.vox.com/2016/8/22/12550852/hillary-clinton-lower-courts> [https://perma.cc/HK3T-8N4W].

plentiful roll call votes and debate time for competent, mainstream aspirants, who easily captured approval, thus consuming scarce floor hours.<sup>33</sup> Those ideas roiled appointments, leaving ninety court openings for practically a half-decade after September 2009.<sup>34</sup> In the 2012 presidential election year, these Republican strategies grew; delay persisted while the last circuit approval came that June.<sup>35</sup>

Texas selection yielded mixed results in Obama's first term, as contrasted with Bush.<sup>36</sup> In 2009, disputes arose over who enjoyed lead responsibility to furnish the Obama Administration names.<sup>37</sup> Kay Bailey Hutchison and John Cornyn asserted their prerogatives, while the Democratic House contingent argued that it would be responsible. Obama favored House members, yet the senators kept affording persons whom the Federal Judicial Evaluation Commission (FJEC) initially vetted.<sup>38</sup> Those disagreements, the entity's slow activation, and its rather dilatory pace when soliciting picks, examining and interviewing candidates and tendering recommendations combined with senators' delay when reviewing proposals and sending choices frustrated nominations. These dilemmas were exacerbated, as the House basically replicated this process. Differences over candidates within the House complement, and between it and the

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33. Tobias, *supra* note 28, at 2244; *see* Seung Min Kim, *McConnell's Historic Judge Blockade*, POLITICO (July 14, 2016), <http://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455> [<https://perma.cc/778J-Q8BY>].

34. *See* Goldman et al., *supra* note 28, at 13. *See generally* *Archive of Judicial Vacancies*, *supra* note 5.

35. *Archive of Judicial Vacancies: Year 2012*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2012> [<https://perma.cc/QGY3-FKG9>]; *see* Tobias, *supra* note 28, at 2246.

36. John Council, *Why Texas Has a Serious Judicial Vacancy Problem*, TEX. LAW. (Sept. 12, 2016), <http://www.texaslawyer.com/id=1202767287264/Why-Texas-Has-a-Serious-Judicial-Vacancy-Problem?slreturn=20160819162501> [<https://perma.cc/4JL7-BVSI>]; Knight, *supra* note 25; Gary Martin, *Vacancies, Backlogs Plague Federal Judiciary*, HOUS. CHRON. (Mar. 2, 2013), <http://www.chron.com/news/politics/article/Vacancies-backlogs-plague-federal-judiciary-4321484.php> [<https://perma.cc/QW8T-QHZS>]. For contrast to Bush, *see also infra* note 45 and accompanying text.

37. John Council, *It Takes Two to Two-Step: Texas Dems & GOP Submit Dueling Recommendations for Judgeships*, TEX. LAW. (Oct. 15, 2009), <http://www.texaslawyer.com/id=1202484498738/It-Takes-Two-to-TwoStep-Texas-Dems--GOP-Submit-Dueling-Recommendations-for-Judgeships> [<https://perma.cc/X8PD-2NG2>]; Gary Martin, *Judicial Vacancies Burden Courts*, SAN ANTONIO EXPRESS-NEWS (May 1, 2010), [http://www.mysanantonio.com/news/local\\_news/article/Judicial-vacancies-burden-courts-795544.php](http://www.mysanantonio.com/news/local_news/article/Judicial-vacancies-burden-courts-795544.php) [<https://perma.cc/8T3Y-LXJ2>].

38. *E.g.*, John Council, *Judging Would-Be Judges: Head of Federal Judicial Evaluation Committee Talks Qualifications, Vacancies and the 5th Circuit*, TEX. LAW. (May 6, 2013), <http://www.texaslawyer.com/id=1202598550240/Judging-WouldBe-Judges> [<https://perma.cc/XYQ4-PRHA>]; Jessica M. Karmasek, *Members of Texas Judicial Evaluation Committee Announced*, LEGAL NEWSLINE (Apr. 17, 2013), <http://legalnewsline.com/stories/510515096-members-of-texas-judicial-evaluation-committee-announced> [<https://perma.cc/49R5-LPH2>].

senators, complicated endeavors. When they reached agreement, Obama may have not.

Despite those machinations, Texas politicians concurred respecting several able, consensus, diverse persons whom they recommended to Obama and whom he nominated for district openings. Illustrative were Gregg Costa, Marina Garcia Marmolejo and Diana Saldaña, who promptly captured appointment.<sup>39</sup> However, Texas' numerous judgeships meant that vacancies frequently resulted, which nullified efforts to compensate for the stalled beginning. Thus, although the Democratic chamber majority's initiatives left no vacancies at Obama's election, unfilled trial court posts rose to seven in his first administration but comprised five at the conclusion.<sup>40</sup> Finally, Hutchison decided to retire and quit proffering selections upon her term's end in 2012, which delayed the process somewhat.<sup>41</sup>

With Obama's reelection, Democrats hoped for greater cooperation, which failed to materialize, and resistance soared the next year when he picked three exceptional, moderate, diverse nominees for the D.C. Circuit, the second most important American tribunal.<sup>42</sup> The GOP restricted floor votes; protracted obstruction led Democrats to explode the "nuclear option" which limited filibusters.<sup>43</sup>

Texas selection over 2013-14 mirrored appointments in the nation then and in the state during the prior four years. Ted Cruz's election in November 2012 and Senate Judiciary Committee membership accorded Texas powerful representation, yet Cornyn and he negligibly coordinated across the 113th Senate; Cornyn insisted the President must nominate before the Senate moves, and Cruz asserted that the Constitution permits

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39. 158 CONG. REC. S2,761 (daily ed. Apr. 26, 2012); 157 CONG. REC. S6,058 (daily ed. Oct. 3, 2011); 157 CONG. REC. S619 (daily ed. Feb. 7, 2011); Guillermo Contreras, *Another Federal Judge May Go*, SAN ANTONIO EXPRESS-NEWS (Dec. 1, 2013), <http://www.expressnews.com/news/local/article/Another-federal-judge-may-go-5026374.php> [<https://perma.cc/D9FR-ZBHN>].

40. *Archive of Judicial Vacancies*, *supra* note 5.

41. Carl Tobias, *Judicial Vacancies in Texas Undercut Delivery of Justice*, THE HILL (Sept. 7, 2012), <http://thehill.com/blogs/congress-blog/judicial/248183-judicial-vacancies-in-texas-undercut-delivery-of-justice> [<https://perma.cc/6TZ4-WDFP>].

42. Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L. J. 121 (2015); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/obama-brief> [<https://perma.cc/DJ9H-X2VX>]; Yglesias, *supra* note 32.

43. On a majority vote, cloture changed from sixty votes to a majority for lower court nominees. 159 CONG. REC. S8,418 (daily ed. Nov. 21, 2013). The Senate Republican majority recently instituted an identical change for Supreme Court nominees. 163 CONG. REC. S2,390 (daily ed. Apr. 6, 2017); see Matt Flegenhimer, *Republicans Gut Filibuster Rule to Lift Gorsuch*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/3HWJ-MCQG>].

GOP leaders to stymie nominees as a check on executive power.<sup>44</sup> Moreover, once vacancies surfaced, the politicians never initiated the FJEC while jurists held active status, even when they gave much notice, imploring the legislators to proceed, and though Cornyn did so with every Bush aspirant.<sup>45</sup> This meant the present circuit openings lacked nominees, but in 2014 the Federal Judicial Evaluation Commission and lawmakers recommended Judge Costa's elevation and Obama concurred, while he secured quick approval.<sup>46</sup> A few talented, centrist district prospects also were confirmed, yet as that year closed Texas had seven open positions.<sup>47</sup> The Senate failed to appoint three fine jurists until 2014 concluded or any nominee the two years post-spring 2012.<sup>48</sup>

### B. Obama's Last Two Years

When the GOP won a majority on November 4, 2014, certain observers were cautiously optimistic, because it diligently promised to establish "regular order."<sup>49</sup> After succeeding,<sup>50</sup> leaders pledged to duly

44. *Benched! Cornyn Passes the Buck on Rising Vacancy Numbers*, ALLIANCE FOR JUST. (Apr. 14, 2015), <http://www.afj.org/blog/benched-cornyn-passes-the-buck-on-rising-vacancy-numbers> [https://perma.cc/FN3H-5MFB]; *Benched! Knowing the Constitution*, ALLIANCE FOR JUST. (Jan. 15, 2015), <http://www.afj.org/blog/benched-knowing-the-constitution> [https://perma.cc/M69S-8XLF]; Ted Cruz, *Obama is Not a Monarch*, POLITICO (Nov. 19, 2014), <http://www.politico.com/magazine/story/2014/11/president-obama-is-not-a-monarch-113028> [https://perma.cc/NP3F-SDM9]. Cornyn and Cruz, as former Texas Supreme Court Justice and Solicitor General, surely have a clearer grasp of the Constitution and the federal judicial selection process than these ideas suggest. Only Texas and Utah have two GOP Judiciary Committee members. *Committee Members*, U.S. SENATE COMMITTEE ON THE JUDICIARY (2016), <https://www.judiciary.senate.gov/about/members> [https://perma.cc/VZ9T-UUK2].

45. ALLIANCE FOR JUSTICE, *supra* note 21; John Council, *Exclusive: Eastern District Chief Judge to Retire*, TEX. LAW. (June 17, 2014), <http://www.texaslawyer.com/id=1202659712641/Exclusive-Eastern-District-Chief-Judge-to-Retire> [https://perma.cc/RV62-WXSW]. They worked little with House members or Obama, who aggressively consulted. Goldman et al., *supra* note 28, at 16; see Jennifer Bendery, *Here's a Look at the Most Ridiculously Long Judicial Vacancies the Senate Still Hasn't Filled*, HUFFINGTON POST (Apr. 12, 2015), [http://www.huffingtonpost.com/2015/04/10/obama-judicial-nominees\\_n\\_7042996.html](http://www.huffingtonpost.com/2015/04/10/obama-judicial-nominees_n_7042996.html) [https://perma.cc/AA9S-4PEH].

46. 160 CONG. REC. S3,175 (daily ed. May 20, 2014); Contreras, *supra* note 39.

47. *Archive of Judicial Vacancies: Year 2014*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2014> [https://perma.cc/JW84-8FR2].

48. 160 CONG. REC. S6,907-08 (daily ed. Dec. 16, 2014); Michael Grunwald, *Did Obama Win the Judicial Wars?*, POLITICO (Aug. 8, 2016), <http://www.politico.com/story/2016/08/obama-courts-judicial-legacy-226741> [https://perma.cc/ABL5-NLKP]; Jeremy W. Peters, *White House Steps Up Effort to Confirm Federal Judges*, N.Y. TIMES (Apr. 28, 2014), [http://www.nytimes.com/2014/04/29/us/white-house-steps-up-effort-to-confirm-federal-judges.html?\\_r=0](http://www.nytimes.com/2014/04/29/us/white-house-steps-up-effort-to-confirm-federal-judges.html?_r=0) [https://perma.cc/D6Z5-W28F].

49. E.g., Sarah Binder, *Can Mitch McConnell Repair the Senate?*, WASH. POST (Nov. 12, 2014), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/11/12/can-mitch-mcconnell-repair-the-senate/> [https://perma.cc/5U8S-SWC4].

50. Jerry Markon et al., *Republicans Win Senate Control as Polls Show Dissatisfaction with*

reemploy this order<sup>51</sup> by invoking the standard procedures that were ostensibly used before Democrats rejected those mechanisms. On the 114th Congress' first business day, Mitch McConnell (R-Ky.), the new Majority Leader, posited “[w]e need to return to regular order” and has dutifully repeated this mantra since.<sup>52</sup> Chuck Grassley (R-Iowa), the Judiciary chair, analogously vowed to follow that order when the committee processed nominees.<sup>53</sup> Cornyn, the Assistant Majority Leader, echoed these sentiments in chamber exchanges and committee deliberations.<sup>54</sup> However, regular order's application to a preeminent constitutional duty, advise and consent on presidential nominees,<sup>55</sup> had minuscule impact.

*1. District Court Process.*—Obama assertively consulted and sought proposals from home state elected officials regarding prominent, consensus selections and usually capitalized on their advice by nominating the candidates.<sup>56</sup> These practices aided confirmations, as lawmakers defer to colleagues from geographic areas with empty seats because they frequently veto picks through blue slip retention.<sup>57</sup> Despite insistent cultivation of many politicians, a number minimally assisted by slowly effectuating procedures or recommending no one.<sup>58</sup>

Texas is the consummate example. The jurisdiction suffers the most immense vacancies, notwithstanding approval of three capable moderates in

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*Obama*, WASH. POST (Nov. 4, 2014), [https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5\\_story.html](https://www.washingtonpost.com/politics/senate-control-at-stake-in-todays-midterm-elections/2014/11/04/e882353e-642c-11e4-bb14-4cfea1e742d5_story.html) [<https://perma.cc/JS6L-UEE2>]; Jonathan Weisman & Ashley Parker, *Riding Wave of Discontent, G.O.P. Takes Senate*, N.Y. TIMES (Nov. 4, 2014), <http://www.nytimes.com/2014/11/05/us/politics/midterm-elections.html> [<https://perma.cc/P5YG-8C5E>].

51. *E.g.*, Binder, *supra* note 49; Jennifer Steinhauer & Jonathan Weisman, *N.S.A. and Other Matters Leave McConnell's Senate in Disarray*, N.Y. TIMES (May 23, 2015), <http://www.nytimes.com/2015/05/24/us/politics/nsa-and-other-matters-vex-senate-leader-and-leave-disarray.html> [<https://perma.cc/7UNM-MRCW>].

52. 161 CONG. REC. S28 (daily ed. Jan. 7, 2015); 161 CONG. REC. S133 (daily ed. Jan. 12, 2015); 161 CONG. REC. S2,767 (daily ed. May 12, 2015). *But see* 161 CONG. REC. S2,949 (daily ed. May 18, 2015); 161 CONG. REC. S3,223 (daily ed. May 21, 2015).

53. S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015).

54. S. Judiciary Comm., *Results of Exec. Business Mtg.* (Feb. 26, 2015).

55. U.S. CONST. art. II, § 2, cl. 2; *see infra* note 76 and accompanying text.

56. *See* Andrew Cohen, *How to Secede From the Union, One Judicial Vacancy at a Time*, ATLANTIC (Apr. 8, 2014), <http://www.theatlantic.com/politics/archive/2014/04/how-to-secede-from-the-union-one-judicial-vacancy-at-a-time/360207/> [<https://perma.cc/J5RJ-7BXR>].

57. *See* Goldman et al., *supra* note 28, at 16–18; Owens et al., *supra* note 29; Tobias, *supra* note 28, at 2242.

58. *See supra* note 30 and accompanying text. At 2015's end, 35 of 39 (19 of 21 emergency) vacancies without nominees were in states with at least one GOP member. *Archive of Judicial Vacancies: Year 2015*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2015> [<https://perma.cc/V23L-DQZH>]. The Administrative Office of the U.S. Courts, the federal courts' administrative arm, bases emergencies on docket size and vacancy length.

both 2015 and 2016.<sup>59</sup> The state has eleven trial court openings, all but one categorized as emergencies.<sup>60</sup> In the April 13, 2015 chamber debate on the first Texas re-nominee from 2014, Patrick Leahy (D-Vt.) discerned “no good” reason why 200 days were required for votes on two pending selections.<sup>61</sup> He elaborated that Texas had more than double any state’s vacancies, and urged its politicians to help the Senate quickly receive prospects for every opening.<sup>62</sup> This situation partly derived from slow treatment of current vacancies, inability to predict new ones, the similarly-extended FJEC pace, and conflicts over recommendations among the House cohort and between them and each senator.<sup>63</sup>

Grassley convened the first hearing on January 21, promising to assess talented, mainstream choices in regular order,<sup>64</sup> alleging that citizens should find no “discernible difference” between how the panel operates with Republican leadership,<sup>65</sup> and suggesting that he would mount hearings every few weeks that Congress worked.<sup>66</sup> Differences promptly arose, however. For instance, the next hearing came *seven* weeks past the first, the third *eight* weeks later, and the fourth on June 10.<sup>67</sup> The March session had two nominees while June possessed three, a substantial contrast to the five whom Leahy routinely processed as chair.<sup>68</sup>

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59. See *supra* notes 47–48 and accompanying text.

60. *Archive of Judicial Vacancies: Year 2016*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016> [https://perma.cc/232C-VNET].

61. He was then the Judiciary Committee Ranking Member. 161 CONG. REC. S2,104 (daily ed. Apr. 13, 2015).

62. *Id.*

63. John Council, *Federal Judge Retirements Hit Texas Hard*, TEX. LAW. (Feb 5, 2016), <http://www.texaslawyer.com/id=1202748966735/Federal-Judge-Retirements-Hit-Texas-Hard> [https://perma.cc/8LAE-9BNC]; Knight, *supra* note 25. But see Sylvan Lane, *Senate Fills South Texas Judgeship; First Confirmation Since GOP Takeover*, DALL. MORNING NEWS (Apr. 13, 2015), <http://trailblazersblog.dallasnews.com/2015/04/senate-fills-south-texas-judgeship-first-confirmation-since-gop-takeover.html/> [https://perma.cc/84ZS-CLJJ].

64. S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015); Jennifer Jacobs, *Grassley’s Checklist of Priorities*, DES MOINES REG. (Jan. 7, 2015), <http://www.desmoinesregister.com/story/news/politics/2015/01/07/grassley-checklist-priorities-judiciary-committee/21394233/> [https://perma.cc/MZ2E-VLN2].

65. David Catanese, *Chuck Grassley’s Gavel Year*, U.S. NEWS (Jan. 28, 2015), <http://www.usnews.com/news/articles/2015/01/28/chuck-grassleys-gavel-year> [https://perma.cc/7LX8-HG5E].

66. Grassley, as the Ranking Member, cooperated with Leahy, as the Chair, in 2011–2014. Compare S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015), with S. Judiciary Comm., *Hearing on Nominees* (Jan. 8, 2014) (statement of Sen. Grassley), and S. Judiciary Comm., *Hearing on Nominees* (Jan. 28, 2014) (statement of Sen. Grassley). See S. Judiciary Comm., *Hearings on Nominees* (Jan. 23, 2013) (statement of Sen. Leahy); S. Judiciary Comm., *Hearing on Nominees* (Feb. 13, 2013) (statement of Sen. Leahy).

67. S. Judiciary Comm., *Hearing on Nominees* (Mar. 11, 2015); S. Judiciary Comm., *Hearing on Nominees* (May 6, 2015); S. Judiciary Comm., *Hearing on Nominees* (June 10, 2015).

68. Compare S. Judiciary Comm., *Hearing on Nominees* (June 10, 2015), and S. Judiciary

In the April 20 debate on the second Texas re-nominee, Grassley explicitly claimed that the GOP was moving at a pace like Democrats had over 2007, while it was treating Obama “nominees extremely fairly.”<sup>69</sup> Harry Reid (D-Nev.) stated that the panel staged very few hearings.<sup>70</sup> Despite Grassley’s pledges, he held over votes from the February 12 meeting,<sup>71</sup> which continued a regime automatically deployed in Obama’s initial six years.<sup>72</sup> 2015 examples were four centrist trial level re-nominees whom GOP panel members favored.<sup>73</sup> Grassley also did not conduct meetings nearly all weeks that the 114th Congress operated.<sup>74</sup>

The Majority Leader slowly noticed debates and chamber ballots on the four re-nominees. A month after panel reports, he decided to convene one on April 13. This seemed a response to Leahy’s idea that voting on no judges was “contrary to historical precedent,” and it sharply contrasted with how Democrats treated Bush, especially in 2007–08 when the party approved ten circuit and fifty-eight district judges.<sup>75</sup> Leahy contended that senators must proffer advice and consent during Obama’s last two years while authorizing seventy-three posts which the Judicial Conference suggested for providing the resources that would enable the bench to deliver justice.<sup>76</sup> He rejected Grassley’s view that eleven nominees approved in the

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Comm., *Hearing on Nominees* (Mar. 11, 2015), with S. Judiciary Comm., *Hearing on Nominees* (Sept. 9, 2014), and S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015).

69. Compared to 273 for Bush at a similar time, 309 were approved. 161 CONG. REC. S2,263 (daily ed. Apr. 20, 2015). Leahy showed that the best yardsticks for measuring successful judicial appointments are the fair treatment of federal court litigants and judges and the number of nominees whom the Senate confirms.

70. He was the Senate Minority Leader. 161 CONG. REC. S3,850 (daily ed. June 8, 2015) (comparing eighteen 2007 and four 2016 approvals at comparable time periods).

71. S. Judiciary Comm., *Results of Exec. Business Mtg.* (Feb. 26, 2015); S. Judiciary Comm., *Exec. Business Mtg.* (Feb. 12, 2015).

72. *E.g.*, S. Judiciary Comm., *Exec. Business Mtg.* (Sept. 11, 2014) (statement of Sen. Grassley); S. Judiciary Comm., *Exec. Business Mtg.* (Nov. 13, 2014) (statement of Sen. Grassley). *See* Tobias, *supra* note 28, at 2242–43. Indeed, the GOP had *not* held over 19 of 360 Obama nominees. *See supra* note 31 and accompanying text.

73. Three were for Texas. Cornyn, Cruz, as well as Orrin Hatch and Mike Lee of Utah are home-state members. S. Judiciary Comm., *Results of Exec. Business Mtg.* (Feb. 26, 2015) (approval votes).

74. Leahy convened meetings practically all weeks that Congress worked. *E.g.*, S. Judiciary Comm., *Exec. Business Mtg.* (Mar. 27, 2014); S. Judiciary Comm., *Exec. Business Mtg.* (Apr. 3, 2014); S. Judiciary Comm., *Exec. Business Mtg.* (Apr. 8, 2014); S. Judiciary Comm., *Exec. Business Mtg.* (June 12, 2014); S. Judiciary Comm., *Exec. Business Mtg.* (June 19, 2014); S. Judiciary Comm., *Exec. Business Mtg.* (June 26, 2014). Some weeks Grassley seemingly lacked nominees or bills for panel members to consider.

75. 161 CONG. REC. S2,029 (daily ed. Mar. 26, 2015); *see* 161 CONG. REC. S2,104 (daily ed. Apr. 13, 2015).

76. 161 CONG. REC. S2,029 (daily ed. Mar. 26, 2015); *see supra* note 55. The Judicial Conference is the federal court policymaking arm. The Conference premises judgeship recommendations on conservative work and case load estimates which it premises on empirical

2014 lame duck session must count against 2015 by finding earlier Congresses “always confirmed consensus nominees prior to long recesses.”<sup>77</sup>

McConnell failed to state publicly when the other three nominees would have ballots, yet he conducted one on April 20, sparking Leahy’s claim that the pace was harming tribunals and the nation.<sup>78</sup> When the Majority Leader kept denying votes on the last two, Reid insisted emergencies had doubled across 2015.<sup>79</sup> Once his notions were ignored, Reid criticized Texas’s seven “emergencies, the most” nationally, and Cornyn’s inability to provoke Senate action despite pledges of rapid consideration.<sup>80</sup> Those salvos apparently led McConnell to notice chamber ballots ahead of the Memorial Day recess on both choices the panel had approved nearly twelve weeks earlier.<sup>81</sup> Leahy used their debate to castigate 2015 selection, proclaiming the Texan would fill one in six emergencies in eight open positions.<sup>82</sup> The Majority Leader slowly instituted confirmation votes for every nominee reported in Obama’s last two years, averaging fewer than one per month.<sup>83</sup> When Charles Schumer (D-N.Y.) argued for July 30 unanimous consent on three fine picks, Grassley objected that 2015 consideration was like 2007.<sup>84</sup> Ten district

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data. U.S. JUDICIAL CONFERENCE, REPORT OF PROCEEDINGS 18–19 (Mar. 10, 2015); *see* U.S. JUDICIAL CONFERENCE, REPORT OF PROCEEDINGS 16–17 (Mar. 14, 2017) (providing the most recent recommendations).

77. 161 CONG. REC. S2,029 (daily ed. Mar. 26, 2015). Concerted Republican obstruction finally forced Democrats to unleash the nuclear option; obstruction left almost 90 vacancies over much of Obama’s first five years. *See* Goldman et al., *supra* note 28, at 13 (consensus nominees’ approval); 161 CONG. REC. S3,224 (daily ed. May 21, 2015) (Grassley claim). *See generally* *Archive of Judicial Vacancies*, *supra* note 5.

78. Grassley said that eleven approvals in the 2014 lame duck session violated regular order, so that adding them equalized the judicial confirmation processes in 2015 and 2007. 161 CONG. REC. S3,224 (daily ed. May 21, 2015) (Grassley claim).

79. 161 CONG. REC. S2,659 (daily ed. May 6, 2015) (reiterating Leahy’s ideas, *supra* notes 77–78).

80. 161 CONG. REC. S2,949 (daily ed. May 18, 2015); *see* S. Judiciary Comm., *Results of Exec. Business Mtg.* (Feb. 26, 2015).

81. They filled emergencies. 161 CONG. REC. S3,224 (daily ed. May 21, 2015) (approving Jill Parrish and Jose Rolando Olvera).

82. He criticized GOP excuses, which miss the larger picture of Republicans’ responsibility to grant advice and consent on presidential nominees. 161 CONG. REC. S3,223 (daily ed. May 21, 2015).

83. *See generally* the archives for years 2015 and 2016 in *Archive of Judicial Vacancies*, *supra* note 5.

84. Grassley instructed Schumer to “put that in [his] pipe and smoke it.” 161 CONG. REC. S6,151–52 (daily ed. July 30, 2015); *see supra* notes 69, 78. Cornyn echoed Grassley’s 2007/2015 trope. 161 CONG. REC. S6,793 (daily ed. Sept. 17, 2015). Republicans granted no other 2016 Democratic requests for unanimous consent. *See, e.g.*, 162 CONG. REC. S2,654 (daily ed. May 10, 2016); 162 CONG. REC. S4,870 (daily ed. July 7, 2016); 162 CONG. REC. S5,045 (daily ed. July 13, 2016); 162 CONG. REC. S5,312 (daily ed. Sept. 7, 2016); 162 CONG. REC. S5,900 (daily ed.

jurists won final ballots in 2015 and eight last year.<sup>85</sup>

2. *Circuit Court Process.*—Circuit appointments warrant comparatively little treatment, as the Senate confirmed one possibility in 2015 to the U.S. Court of Appeals for the Federal Circuit with a second in January 2016 for the U.S. Court of Appeals for the Third Circuit. The Texas vacancies have persistently lacked nominees over sixty-one and forty-four months. That is emblematic, because no reason justifies infinite delay, which felicitously mustering Costa’s elevation aptly shows.

In November 2014, Obama proposed Kara Farnandez Stoll, an experienced practitioner, for the Federal Circuit and District Judge Luis Felipe Restrepo, a talented, centrist jurist, for the Third.<sup>86</sup> In March 2015, Stoll had a hearing that progressed well<sup>87</sup> but only earned April committee approval, languishing weeks on the floor.<sup>88</sup> That June, McConnell suggested the GOP could permit final votes on no more Obama appeals court selections.<sup>89</sup> When the press stated this, his aide indicated that the Senate would “continue to do judges . . . [and probably] have a circuit nominee.”<sup>90</sup> On June 8, Reid invoked McConnell’s 2008 demands for speedy review of Bush appellate prospects, denoting the body had yet to confirm any jurist, “not even a consensus nominee such as Kara Stoll.”<sup>91</sup> Leahy then argued for prompt treatment, which seemed to promote her July ballot.<sup>92</sup>

Restrepo compellingly illuminates delay. The accomplished,

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Sept. 20, 2016).

85. See generally *Archive of Judicial Vacancies*, *supra* note 5. All of Leahy’s ideas deflate the regular order mantra articulated by numerous Republican senators, especially Senators McConnell and Grassley.

86. Both lacked 2014 hearings because Obama nominated them in November. Press Release, White House, Office of the Press Sec’y, President Obama Nominates Two to Serve on the United States Courts of Appeals (Nov. 12, 2014); Press Release, White House, Office of the Press Sec’y, Presidential Nominations Sent to the Senate (Jan. 7, 2015).

87. S. Judiciary Comm., *Hearing on Nominees* (Mar. 11, 2015).

88. S. Judiciary Comm., *Exec. Business Mtg.* (Apr. 23, 2015).

89. Steve Benen, *McConnell’s Silent Governing Failure*, MSNBC (June 5, 2015) <http://www.msnbc.com/rachel-maddow-show/mcconnells-silent-governing-failure> [<https://perma.cc/C4QH-M4RP>]; Burgess Everett & Nick Gass, *McConnell Vows to Slow Judicial Nominees*, POLITICO (June 5, 2015), <http://www.politico.com/story/2015/06/mitch-mcconnell-judicial-nominations-118674> [<https://perma.cc/25PP-KK2J>].

90. Alexander Bolton, *McConnell Backs Away from Judicial Shutdown Talk*, THE HILL (June 6, 2015), <http://thehill.com/homenews/senate/244196-mcconnell-backs-away-from-judicial-shutdown-talk> [<https://perma.cc/Z22X-GYYG>].

91. 161 CONG. REC. S3,849–50 (daily ed. June 8, 2015).

92. Leahy urged that the Senate had not approved a single judge since May. 161 CONG. REC. S4,591–92 (daily ed. June 24, 2015); see 161 CONG. REC. S4,678 (daily ed. July 7, 2015) (Stoll approval).

mainstream nominee waited seven months on a committee hearing,<sup>93</sup> notably because Pat Toomey (R-Pa.) retained the blue slip.<sup>94</sup> He and Casey urged elevation in a press release with Toomey declaring that Restrepo would be a “superb addition to the Third Circuit.”<sup>95</sup> The June hearing proceeded smoothly; the nominee directly answered queries while Toomey lavished consummate praise and the members appeared satisfied.<sup>96</sup> The committee held over the nominee yet reported him.<sup>97</sup> After 420 days, the Majority Leader provided a January 2016 chamber vote.<sup>98</sup>

Obama eschewed nomination of 2015 aspirants when Republican home state officers failed to collaborate, but he did proffer seven well qualified, mainstream picks in 2016.<sup>99</sup> Donald Schott and Jennifer Klemetsrud Puhl realized summer panel ballots;<sup>100</sup> Judge Lucy Haeran Koh’s hearing was noticed then, and the committee approved her in September.<sup>101</sup> Yet, McConnell’s 2015 perspective on circuit approvals coupled with inaction left unclear whether they would earn appointment because the Senate recessed to campaign in late September without voting on anyone. Four additional nominees never received processing due to

93. See *supra* note 87 and accompanying text. For comparatively thorough treatment of Judge Restrepo’s confirmation process, see Carl Tobias, *Confirming Judge Restrepo to the Third Circuit*, 88 TEMPLE L. REV. ONLINE 37 (2017).

94. Bob Casey (D-Pa.) returned his blue slip on Nov. 14. Saranac Hale Spencer, *Toomey Sends Blue Slip, But Will Restrepo Get a Hearing?*, LEGAL INTELLIGENCER (May 19, 2015), <http://www.thelegalintelligencer.com/id=1202726785818?keywords=toomey&publication=The+Legal+Intelligencer> [https://perma.cc/FG9R-397L].

95. Sen. Robert Casey, *Casey, Toomey Applaud Nomination of Judge Luis Felipe Restrepo to U.S. Court of Appeals for the Third Circuit*, SENATE.GOV, (Nov. 12, 2014), <https://www.casey.senate.gov/newsroom/releases/casey-toomey-applaud-nomination-of-judge-luis-felipe-restrepo-to-us-court-of-appeals-for-the-third-circuit> [https://perma.cc/B8L5-27RH].

96. S. Judiciary Comm., *Hearing on Nominees* (June 10, 2015); see Tracie Mauriello, *Toomey Signs Off on Nominee for Federal Appeals Court*, PITT. POST-GAZETTE (May 14, 2015), <http://www.post-gazette.com/%20local/region/2015/05/14/Toomey-signs-off-on-nominee-for-federal-appeals-court/stories/201%20505140325> [https://perma.cc/S8FM-8V65]; Spencer, *supra* note 94.

97. S. Judiciary Comm., *Exec. Business Mtg.* (July 9, 2015) (voice voting Restrepo without dissent).

98. He won 95–0 approval. 162 CONG. REC. S21 (daily ed. Jan. 11, 2016).

99. Russell Wheeler, *With Senate Control, Will the GOP Stop Confirming Circuit Court Judges?*, BROOKINGS INST. (June 10, 2015), <https://www.brookings.edu/blog/fixgov/2015/06/10/with-senate-control-will-the-gop-stop-confirming-circuit-court-judges/> [https://perma.cc/X8L7-DPH].

100. S. Judiciary Comm., *Hearings on Nominees* (May 18, 2016); S. Judiciary Comm., *Hearings on Nominees* (June 23, 2016); S. Judiciary Comm., *Exec. Business Mtg.* (June 16, 2016); S. Judiciary Comm., *Exec. Business Mtg.* (July 14, 2016). The 7th Circuit’s Donald Schott was earlier than the 8th Circuit’s Jennifer Klemetsrud Puhl.

101. S. Judiciary Comm., *Hearing on Nominees* (July 13, 2016). The Ninth Circuit’s Lucy Haeran Koh earned panel approval in September. S. Judiciary Comm., *Exec. Business Mtg.* (Sept. 15, 2016).

home-state politicians' retention of blue slips.<sup>102</sup> This inaction persisted over the lame duck session and the seven nominations finally expired on January 3, 2017, which meant that the chamber approved the fewest circuit jurists since 1897- 1898.<sup>103</sup> Finally, Texas appellate openings lacked designees, while national circuit activity inspired minimal confidence that Republicans would allow chamber votes, had any pick been nominated.

### III. Implications

The factors recounted mean that the bench experiences twenty circuit, 115 district court, and sixty emergency, vacancies, while Texas confronts two appeals court, eleven district, and twelve emergency, openings.<sup>104</sup> Unoccupied posts ranged close to ninety in much of the five years after September 2009 while the current 135 openings substantially exceed that number; the courts were only able to experience fewer vacancies for a somewhat brief period *following* the nuclear option's late 2013 detonation which restricted filibusters.<sup>105</sup>

Delayed appointments require that exceptional, moderate nominees place their careers on hold and dissuade myriad impressive candidates from even thinking about federal court service.<sup>106</sup> Protracted review denies tribunals the judicial resources which they desperately need; impedes swift, economical, and fair case resolution,<sup>107</sup> imposes extreme pressure on

102. They were Third, Sixth, Seventh and Eleventh Circuit nominees Rebecca Ross Haywood, Lisabeth Tabor Hughes, Myra Selby and Abdul Kallon. *Blue Slip Report*, ALLIANCE FOR JUST. (Sept. 16, 2016, 8:41 AM), <http://www.afj.org/our-work/judicial-selection/blue-slip-report> [<https://perma.cc/M74Z-NKMA>].

103. Christopher Kang, *Republican Obstruction Could Be the Worst Record Since 1800s*, HUFFINGTON POST (Apr. 20, 2016), [http://www.huffingtonpost.com/christopher-kang/republican-obstruction-of\\_b\\_9741446.html](http://www.huffingtonpost.com/christopher-kang/republican-obstruction-of_b_9741446.html) [<https://perma.cc/G7JG-U2CF>] (the national system consisted of 25 circuit judges then rather than the current 179); Kim, *supra* note 33; 162 CONG. REC. S7,183 (daily ed. Jan. 3, 2017) (expiring nominations).

104. Judicial emergencies quintupled from twelve in January 2015. *See supra* notes 62, 82; *see also* Bruce Moyer, *August 2016: Judicial Vacancies Move Toward Historic Levels*, FED. B. ASS'N (Aug. 2016), <http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2016/August-2016-Judicial-Vacancies-Move-Toward-Historic-Levels.aspx> [<https://perma.cc/S6F5-3DUL>] (attributing ten vacancies in the preceding two years largely to Texas senators' delay in sending Obama names); Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL STREET J. (Apr. 6, 2015), <http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746> [<https://perma.cc/XTN4-J3U5>].

105. *See supra* notes 34, 42–43 and accompanying text.

106. Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015), [http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies\\_us\\_55d77721e4b0a40aa3aaf14b](http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b) [<https://perma.cc/H275-CQBB>]; Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation Delays*, ATLANTIC (Sept. 9, 2012), <http://www.theatlantic.com/politics/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/> [<https://perma.cc/EYR9-CYQP>].

107. Gabrielle Banks, *Texas Leads Nation in Federal Judicial Vacancies*, HOUS. CHRON. (Dec. 20, 2016), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Texas->

increasingly overworked jurists;<sup>108</sup> and makes litigants waste years seeking civil trials and pursuing settlements.<sup>109</sup> These deleterious consequences also undercut citizen regard for the selection process and the coequal government branches.<sup>110</sup>

Texas addresses dire circumstances. Vacancies' sheer quantity and lengthy nature have exacted a toll. The prolonged Fifth Circuit openings limit the state's representation by active judges, intensify problems that the court's other jurists encounter, and clearly slow appeals. Burgeoning criminal and immigration cases require that many district judges prodigiously labor nights and weekends. This complicates efforts to set firm trial dates for pending civil actions, conduct trials, and reach settlements, which concomitantly means that a plethora of Texas individuals and corporations wait forever on trials and suits' disposition.<sup>111</sup> Those predicaments can force jurists to become senior judges at the earliest time or retire, depriving the courts of invaluable experience and resources, in particular which compensate for attenuated vacancies, while even necessitating that the Texas district courts import jurists from districts which are outside Texas.<sup>112</sup> Empty judgeships created so many problems that Texas industries established a group which lobbies the officials to fill numbers of seats.<sup>113</sup>

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leads-nation-in-federal-judicial-vacancies-10810025.php; Gary Fields & John R. Emshwiller, *Criminal Case Glut Impedes Civil Suits*, WALL STREET J. (Nov. 10, 2011), <http://www.wsj.com/articles/SB10001424052970204505304577001771159867642> [https://perma.cc/C2NE-PRLV].

108. JOHN ROBERTS, YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); see John Council, *The Slowpoke Report: Vacancies, Crushing Caseload Take Toll on Texas Bench*, TEX. LAW. (Feb. 1, 2017), <http://www.texaslawyer.com/id=1202776937994/The-Slowpoke-Report-Vacancies-Crushing-Caseloads-Take-Toll-on-Texas-Bench?slreturn=20170311120428> [https://perma.cc/6D9C-SJMP]; Wheeler, *supra* note 99.

109. Tobias, *supra* note 28, at 2253; Banks, *supra* note 107.

110. Shira A. Scheindlin, *America's Trial Court Judges: Our Front Line for Justice*, N.Y. TIMES (May 6, 2016), <http://www.nytimes.com/2016/05/07/opinion/americas-trial-court-judges-our-front-line-for-justice.html> [https://perma.cc/D2PA-U3YQ]; see *supra* notes 107, 109 and accompanying text.

111. Alliance for Justice, *supra* note 21; Jazmine Ulloa, *Texas Federal Judges Sound Alarm Over Empty Judicial Posts*, AUSTIN AM.-STATESMAN (June 15, 2014, 8:13 PM), <http://www.mystatesman.com/news/news/crime-law/texas-federal-judges-sound-alarm-over-empty-judici/ngLrR/#5c8ceea0.257301.735400> [https://perma.cc/KK8J-DKKH]; see Cohen, *supra* note 56 (explaining how the Texas senators were failing to discharge their constitutional responsibility for insuring that the judiciary meets citizen needs); Moyer, *supra* note 104 (explaining that three of the four Texas districts rank among the top ten courts with the most substantial workloads).

112. S. Judiciary Comm., *Hearing on Nominees* (July 13, 2016) (statement of Judge Reeves); Council, *supra* note 63; Cindy George, *Judgeship Vacancies Translate into Delays*, HOUS. CHRON. (June 27, 2015, 9:42 PM), <http://www.chron.com/news/houston-texas/houston/article/Judgeship-vacancies-translate-into-delaysHouston-6353862.php> [https://perma.cc/Y2QD-RNNG]; see *infra* notes 124–25 and accompanying text.

113. Kevin Diaz, *Congress Slow to Fill Federal Bench in Texas*, HOUS. CHRON. (Jan. 26,

#### IV. Suggestions For The Future

The White House and Texas politicians should cooperate in each phase of the process to solve the acute vacancy crisis. All lawmakers ought to follow regular order by using practices that will streamline the procedures, installing excellent, centrist designees in the abundant, escalating open slots.<sup>114</sup> Cornyn—the Assistant Majority Leader, who correspondingly has panel seniority—is uniquely positioned to expedite nominations and confirmations.

The administration must assertively consult Texas officers because the jurisdiction experiences numerous lengthy vacancies and more than a fifth of the emergency openings nationwide. The politicians should augment collaboration by more promptly affording strong, consensus prospects.<sup>115</sup> The FJEC, which solicits, evaluates, interviews and recommends choices, has been helpful, yet the panel and the officials have worked slowly.<sup>116</sup> The two Fifth Circuit, and large number of district, openings could result from the commission pace or the senators' failure to activate the panel swiftly.<sup>117</sup> Thus, the commission as well as Senate and House members can explore diverse, promising models, namely the Wisconsin and California initiatives that functioned well across Bush's years, while recalibrating endeavors to speedily propose submissions.<sup>118</sup> For instance, the politicians should move quickly when empty posts surface or diligently predict them.<sup>119</sup> The legislators need to start commission processes quickly once jurists indicate that they may become senior judges or retire and efficiently proffer suggestions.<sup>120</sup> Quite a few jurists provide notice when they decide, but others could be more timely.<sup>121</sup> Related helpful notions are proposing

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2015, 9:17PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Congress-slow-to-fill-federal-bench-in-Texas-6036339.php> [https://perma.cc/3C2Q-3Y4Z].

114. For numerous specific recommendations for improving the selection process, see Michael Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 298–311 (2012); Tobias, *supra* note 28, at 2255–66. Senators must at least apply the customs employed during Bush's years.

115. *See supra* notes 25, 40, 45, 48 and accompanying text.

116. The politicians have considerably greater responsibility. Council, *supra* note 38; Knight, *supra* note 25.

117. *See supra* note 45 and accompanying text.

118. Disparities in Texas judicial appointments during the Bush and Obama years show that Cornyn can expedite processes and the FJEC can move quickly. Tobias, *supra* note 28, at 2256. *But see* Craig Gilbert, *Wisconsin Seat on U.S. Appeals Court Remains a Symbol of Partisan Judicial Wars*, MILWAUKEE JOURNAL SENTINEL (Aug. 14, 2017), <http://www.jsonline.com/story/news/politics/2017/08/14/now-they-power-republican/560803001/> [https://perma.cc/2HL9-E5YR] (suggesting that the Wisconsin panel may have operated less smoothly recently); Grunwald, *supra* note 48 (same).

119. Tobias, *supra* note 28, at 2256; *see supra* notes 45, 62 and accompanying text.

120. Knight, *supra* note 25.

121. Senators may even respectfully ask those eligible to notify them soon after deciding. 28

several designees and identifying preferences, which can enlarge White House flexibility and minimize the necessity to reopen the selection process.<sup>122</sup>

A valuable solution for circuit vacancies is elevating district judges, as the chamber approved them initially while the jurists have compiled much experience and comprehensive, accessible records. The construct would help fill both Texas openings, because its lawmakers asked that Judge Costa, who easily won appointment, be promoted, while they suggested plentiful selections for the trial courts, notably District Judges Marmolejo and Saldaña, who deserve consideration.<sup>123</sup>

A related productive device would be renominating able, consensus nominees, specifically the five 2016 Texas aspirants who enjoyed hearings last year. Cornyn and Cruz previously submitted and powerfully supported the prominent, mainstream designees, their renominations would speed confirmation and preserve resources and the Texas courts desperately need more judges.<sup>124</sup>

In the unlikely event that Texas legislators appear unresponsive to White House overtures by tendering no candidates or acting too slowly,<sup>125</sup> the President might nominate without their support. Obama rarely did that until 2016 for multiple circuit picks, albeit not Texas.<sup>126</sup> This strategy may

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U.S.C. § 371 (2006); *see* George, *supra* note 112. I am not suggesting that Presidents, senators or judicial colleagues pressure jurists about status changes. Judges must be completely free to make this critical professional and personal decision.

122. This occurs if the White House disagrees with one pick sent. Senators whose party lacks the presidency may send one. *E.g.*, Joseph Morton, *Obama Names Omaha Attorney Rossiter to Federal Bench in Nebraska*, OMAHA WORLD-HERALD (June 12, 2015), [http://www.omaha.com/news/crime/obama-nominates-omaha-attorney-rossiter-to-federal-bench-in-nebraska/article\\_7517dc5c-1084-11e5-9f03-eb447e9aaa07.html](http://www.omaha.com/news/crime/obama-nominates-omaha-attorney-rossiter-to-federal-bench-in-nebraska/article_7517dc5c-1084-11e5-9f03-eb447e9aaa07.html) [https://perma.cc/SFW7-U2SJ]. *But see* Tobias, *supra* note 28, at 2251.

123. *See supra* note 39 and accompanying text. Senators Hutchinson and Cornyn recommended and supported both judges who captured 2011 confirmation. Trump reportedly asked the FJEC to evaluate Texas District Judge Reed O'Connor for possible elevation. *See* sources cited *infra* note 158.

124. The nominees had ABA evaluations and strong ratings, comprehensive FBI background checks, thorough panel investigations and comprehensive hearings in which Cornyn and Cruz lavished praise on the nominees and in which members appeared satisfied, while they only need panel discussions and votes and floor debates and chamber ballots. *See infra* notes 135–45 and accompanying text (analyzing 5 nominees' hearing and post-hearing treatment); Kevin Diaz, *Texas is Ground Zero As Trump Steers the Federal Judiciary to the Right*, HOUS. CHRON. (Aug. 12, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-is-Ground-Zero-as-Trump-steers-the-federal-11807743.php> [https://perma.cc/WAP2-H5VM] (suggesting that few analysts believe the Texas senators will recommend that Trump renominate the 5 nominees, because “they have the taint of being ‘consensus’ candidates officially nominated by Obama”); *see also infra* note 163 and accompanying text.

125. *See supra* notes 36–38, 44–45 and accompanying text.

126. It is unclear why Obama eschewed nominating 2016 Texas Circuit prospects, as Obama considered district judges when he elevated Costa. Contreras, *supra* note 39; John Council, *Then*

lack efficacy, which could indicate why he eschewed naming Texans for the Fifth Circuit vacancies.<sup>127</sup>

The administration can also pursue more drastic constructs, which are probably not warranted today, because the same party controls the White House and the Senate. For instance, Trump could nominate recommendations for all vacancies or from places other than states where circuit openings arise—which can dramatize and publicize how chronic vacancies erode justice—or advocate “trades,” a concept which Obama purportedly used to fill six protracted Georgia open slots.<sup>128</sup>

The White House should expedite initiatives before and when Texas politicians send choices. For example, the administration could grant nominations significantly higher priority and greater resources.<sup>129</sup> It may carefully facilitate ABA and FBI consideration and White House evaluations and nominations while urging much swifter chamber analyses.<sup>130</sup> Once the President forwards nominees, Texas senators must promptly deliver their blue slips. Indeed, no persuasive reason explains why Cornyn and Cruz delayed returning their blue slips plenty of weeks after Obama tapped the five March 2016 nominees or why Grassley did not arrange their hearing until after the protracted summer recess.<sup>131</sup>

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*There Were Three*, TEX. LAW. (Dec. 9, 2013), <http://www.texaslawyer.com/id=1202630936066?keywords=then+there+were+three&publication=Texas+Lawyer>.

127. If home-state senators retain blue slips, processing halts. *See supra* notes 29, 57, 105 and accompanying text.

128. For trades, see Daniel Malloy, *The Delegation Georgians in D.C.; Woodall Does Balancing Act in House GOP Post*, ATLANTA J.-CONST., July 20, 2014, at 14A; *see also* Tobias, *supra* note 28, at 2261; Ben Kamisar, *Obama Names Three Texas Judges in Apparent Deal with Cornyn and Cruz*, DALL. MORNING NEWS (June 26, 2014, 6:20PM) <http://trailblazersblog.dallasnews.com/2014/06/obama-names-three-texas-judges-in-apparent-deal-with-cornyn-and-cruz.html/> [<https://perma.cc/4U6V-3UT7>]; Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2195–96 (2011) (out of state nominee idea); David Lat, *Circuit Court Nominees in the Trump Administration (Part I)* 11-12, ABOVE THE LAW (July 21, 2017), <http://abovethelaw.com/2017/07/circuit-court-nominees-in-the-trump-administration-the-latest-news-and-rumor-part-1/> [<https://perma.cc/A9MJ-S73S>] (raising the possibility of Trump nominating a Texan to vacancies that arise in Louisiana or Mississippi, the other two states that comprise the Fifth Circuit, but criticizing the prospect as inadvisable). The White House may also compromise on the type of nominees whom it prefers.

129. Goldman et al., *supra* note 28, at 11–13; Tobias, *supra* note 28, at 2250–51.

130. Tobias, *supra* note 28, at 2235; *see also* S. Judiciary Comm., *Hearing on Nominees* (July 13, 2016). *But see* MILLER CTR. OF PUB. AFFAIRS, *supra* note 1, at 3; Tobias, *supra* note 3, at 1270.

131. ALLIANCE FOR JUSTICE, *supra* note 105; Jennifer Bendery, *Republicans Aren't Even Pretending They Want to Confirm Judges Anymore*, HUFFINGTON POST (June 28, 2016, 3:43 PM) [http://www.huffingtonpost.com/entry/senate-republicans-obama-judges\\_us\\_576426b6e4b0853f8bf0a4fa](http://www.huffingtonpost.com/entry/senate-republicans-obama-judges_us_576426b6e4b0853f8bf0a4fa) [<https://perma.cc/7JYH-K7JM>]; *see* John Council, *Obama Still Has Shot to Fill Half of Texas' U.S. Judicial Vacancies*, TEX. LAW. (July 20, 2016), <http://www.texaslawyer.com/id=1202763156686/Obama-Still-Has-Shot-to-Fill-Half-of-Texas-US-Judicial-Vacancies> [<https://perma.cc/WCM6-UPKK>]; *see* Michael Macagnone, *Texas Federal Judge Hopefuls Face Senate Questioning*, LAW 360 (Sept. 7, 2016), <http://www.law360.com/>

The Texas politicians should prevail on Grassley to convene hearings for more nominees while scheduling faster panel discussions and committee votes, specifically for the 2016 aspirants, if Trump renominates them.<sup>132</sup> The chair might explore productive ideas for speedy assessment. A constructive notion, which Hatch employed as chair in Bush's presidency, was abbreviated hearings for talented, mainstream nominees.<sup>133</sup> Recent examples were sessions for the Texas district nominees confirmed during 2015 and Restrepo, which constituted an hour of copious pointed queries and complete, direct responses.<sup>134</sup>

Grassley finally arranged the hearing on the March 2016 nominees in September following the chamber's return from the summer recess.<sup>135</sup> He asked that Cornyn serve as chair of the hearing. Cornyn introduced the five prospects, stated that the Evaluation Commission had powerfully recommended the selections, praised their qualifications, and observed that cooperative action with the chief executive had persuaded Obama to nominate them.<sup>136</sup> Cruz similarly lauded the candidates and called for their prompt appointment.<sup>137</sup> The session progressed smoothly and members appeared satisfied with the nominees' responses to questions.<sup>138</sup>

At the hearing's conclusion, Cornyn announced that the record would

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articles/836727/texas-federal-judge-hopefuls-face-senate-questioning [https://perma.cc/3YEU-EAC5] (contending that Senator "Cruz had not submitted a 'blue slip' in time for the committee to proceed before the summer recess").

132. See S. Judiciary Comm., *Hearing on Nominees* (July 13, 2016) (statement of Sen. Leahy) (holding hearings and approving 10 Bush district nominees in Sept. 2008). *But see supra* note 69 and accompanying text. The prospects for renomination of the five Texas nominees are unfavorable, even though Trump has renominated three Obama district court nominees and is seriously considering renominating more. *See supra* note 124; *infra* note 166. Cornyn as a senior panel member and the Assistant Majority Leader can prevail on Grassley, who should be receptive, given Texas's urgent need.

133. Tobias, *supra* note 28, at 2263.

134. S. Judiciary Comm., *Hearing on Nominees* (June 10, 2015); S. Judiciary Comm., *Hearing on Nominees* (Jan. 21, 2015).

135. S. Judiciary Comm., *Hearing on Nominees* (Sept. 7, 2016); *see* Diaz, *supra* note 124 (suggesting that Grassley's September scheduling of the hearing contravened a "long-standing Senate rule against late-election confirmation hearings [and] the hearing was timed, some Democrats believed, as insurance against a victory by Hillary Clinton, who was then ahead in the polls"); Mario Recio, *Texas Nominees for 'Outrageous' Judge Vacancies Get Senate Hearing*, MCCLATCHYDC.COM, Sept. 7, 2016.

136. *Hearing, supra* note 135; *see* Jordan Rudner, *5 Texas Judge Nominees Have Broad Support But Won't Be Confirmed Anytime Soon*, DALL. MORNING NEWS (Sept. 7, 2016), <http://www.dallasnews.com/news/courts/2016/09/07/five-texas-judge-nominees-broad-support-confirmed-anytime-soon> [https://perma.cc/37L5-8C8J].

137. *Hearing, supra* note 135; *see* Jamie Lovegrove, *White House Blasts Cruz, Cornyn for Pushing Texas Judges While Blocking Supreme Court Nominee*, DALL. MORNING NEWS (Sept. 16, 2016), <http://www.dallasnews.com/news/politics/2016/09/16/white-house-tangles-cruz-cornyn-judges> [https://perma.cc/T6PP-2WPT].

138. *Hearing, supra* note 135; *see* Rudner, *supra* note 136.

remain open for one week, so that members could submit written queries.<sup>139</sup> Senator Grassley asked all five nominees the same eighteen questions, most of which pertained to case management and the role of precedent.<sup>140</sup> Senator Thom Tillis (R-N.C.) concomitantly asked each nominee ten identical questions, most of which related to constitutional interpretation and the First, Second, Eighth, and Fourteenth Amendments.<sup>141</sup> All five of the nominees swiftly responded to the queries, and the nominee responses were clear and comprehensive.<sup>142</sup>

Throughout the hearing, Cornyn emphasized the desperate circumstances in Texas and promised that the nominees would receive swift affirmative or negative floor ballots.<sup>143</sup> Despite Cornyn's pledges that the chamber would promptly supply final votes on the five nominees, and even though regular order typically dictated that the panel would convene executive business meetings every Thursday that the Senate worked, Grassley neglected to conduct executive business meetings on September 22 or 29.<sup>144</sup> This meant that the five nominees could not have committee discussions and ballots until the Senate returned in mid-November after the elections. The chair should have arranged a meeting promptly after the Senate convened and *not* held over the discussions and votes for several important reasons.<sup>145</sup> The nominees had waited over three months since their hearing, comparatively little time remained in that congressional session and routinely delaying panel discussions and ballots, particularly for nominees to emergency vacancies, was unwarranted. The Senate met for plentiful weeks over the lame duck session, yet Grassley never chose to arrange a vote. Thus, the five 2016 Texas district prospects' nominations expired on January 3, 2017.<sup>146</sup>

The Majority Leader should increase rigorous chamber debates and votes, because considering only one nominee every month in President Obama's last two years eviscerated justice, namely in Texas, which

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139. *Hearing*, *supra* note 135.

140. Questions for the Record Submitted by Senator Chuck Grassley (Sept. 2016).

141. Questions for the Record Submitted by Senator Thomas Tillis (Sept. 2016).

142. Responses of David Counts III, E. Scott Frost, James Wesley Hendrix, Irma Carrillo Ramirez and Karen Gren Scholer to Questions for the Record Submitted by Senators Charles Grassley and Thomas Tillis (Sept. 2016).

143. *Hearing*, *supra* note 135; *see* Council, *supra* note 36; Lovegrove, *supra* note 137; Recio, *supra* note 135.

144. *See Hearings & Meetings*, S. JUDICIARY COMM., <https://www.judiciary.senate.gov/hearings> [<https://perma.cc/W638-JWCQ>] (showing that no executive meetings took place on September 22 or 29).

145. Grassley held over votes on all Texas nominees; most were for emergencies, like the March 2016 picks. *Archive of Judicial Vacancies*, *supra* note 5; *supra* notes 71–73 and accompanying text (*not* holding over very few, including two Iowa nominees).

146. *See supra* note 103 and accompanying text.

addresses twelve emergency vacancies. For instance, McConnell needs to reinstitute a custom from President Bush's time, giving each competent, moderate district suggestion on the floor a vote near long recesses,<sup>147</sup> and to clarify the current Republican view on supplying appellate choices final ballots, because approving a minuscule number over a White House's last half term was unprecedented. He ought to cooperate with Assistant Majority Leader Cornyn, who is perfectly situated for applying pressure, if warranted, to confirm numerous Texas aspirants.<sup>148</sup>

Because the GOP continued obstruction, the Obama Administration might have deployed, but failed to use, rather drastic tools. For example, the White House could have relied on the bully pulpit when holding numbers of lawmakers accountable, taken selection to the people or considered open seats an election issue.<sup>149</sup> The chief executive and legislators could have dramatically altered the process through structuring a bipartisan judiciary in which the party that lacks the White House can tender specific percentages of recommendations, a solution which the Pennsylvania senators adopted and continue employing.<sup>150</sup> Texas might have applied this for *district* vacancies.<sup>151</sup> Some of these mechanisms could have been packaged with a judgeships law which became effective over 2017, so that neither party would reap unfair advantage but this did not happen.<sup>152</sup> The 114th Congress eschewed a thorough measure, although the

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147. See *supra* note 77 and accompanying text.

148. Texas's desperate straits could have supported leapfrogging the 2016 picks, a phenomenon witnessed in Grassley's orchestrating rapid confirmation of two Iowans. See *Archive of Judicial Vacancies*, *supra* note 5; *supra* notes 71–73 and accompanying text (holding over four 2015 re-nominees whom Republican home-state senators recommended).

149. Illustrative is shaming politicians who send no picks. David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1902–06 (2008); Tobias, *supra* note 28, at 2261.

150. Michael Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051, 2056–58 (2016). The senator whose party does not control the White House recommends one in every four district candidates. *PA Judge Luis Restrepo Confirmed to Federal Appeals Court*, PENNSYLVANIANS FOR MOD. CTS., <http://pmconline.org/node/450> [<https://perma.cc/7KTJ-LKY8>]; Press Release, Bob Casey and Pat Toomey, U.S. Senators for Pennsylvania, Senators Casey and Toomey Continue Bipartisan Agreement on District Court Vacancies, Mar. 10, 2017. This suggestion could be instituted in particular states or nationally.

151. Texas officers might have chosen one in four. See Tobias, *supra* note 150. Texas senators' lack of cooperation effectively instituted bipartisan courts. Most Presidents assume the lead on making appellate nominations because circuits comprise multiple states (thus diluting senatorial courtesy somewhat), while circuit opinions govern them and set more policy. Shenkman, *supra* note 114, at 226–28; Tobias, *supra* note 28, at 2240.

152. Tobias, *supra* note 150, at 2057–58; see Tobias, *supra* note 42, at 140; see *supra* note 76 and accompanying text. Although passage of thorough judgeships legislation seemed unrealistic after the 2016 elections, Republicans' capture of the presidency, the Senate and the House of Representatives could actually make passage more realistic, especially if both parties initiate a bipartisan judiciary. More judgeships will not remedy the judicial vacancy crisis, if the Senate

new Congress should adopt a comprehensive bill or at least pass “border” legislation to alleviate crushing Texas dockets.<sup>153</sup>

Finally, selection participants need to assess comprehensive ways of ending or ameliorating the confirmation wars in which Texas apparently comprises the epicenter. It will be essential to terminate or at least slow the incessant, vicious cycle of paybacks and strident, counterproductive politicization epitomized in Republican and Democratic rhetoric and concomitant actions that were on full display in the recent confirmation process for Justice Neil Gorsuch.

#### V. A Post-Election Postscript

It remains unclear what the elections of President Donald Trump and a 52-48 GOP Senate majority portend for the Texas judicial vacancy crisis. The significant need for privacy of the candidates, the Texas senators and the President may explain this lack of clarity. Nevertheless, some relevant information exists.

Trump’s highest priority has been establishing a government. Insofar as there was time for court appointments, filling the Supreme Court opening demanded much effort. Limited information exists regarding lower court appointments partly because Justice Scalia’s vacancy preoccupied many salient participants; the White House and Justice Department, which have lead responsibility, fulfilled other critical duties; and home state politicians have been helping to create a new government and may have been waiting on the chief executive.

However, considerable information regarding administration lower court endeavors is available generally and on Texas specifically.<sup>154</sup> The chief executive has been applying certain measures that prior administrations deployed. For instance, the White House Counsel has assumed substantial responsibility for nominations, especially to appeals courts, and has been diligently cooperating on recommendations with

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cannot confirm nominees.

153. S.1014, 112th Cong. (2011). A comprehensive immigration reform bill amendment that would have authorized additional judgeships for border jurisdictions passed the Senate in 2013. S.744, 113th Cong. (2013); Martin, *supra* note 37.

154. I rely substantially in this paragraph on Shane Goldmacher, *Trump’s Hidden Back Channel to Justice Kennedy: Their Kids*, POLITICO (Apr. 6, 2017), <http://www.politico.com/story/2017/04/donald-trump-supreme-court-236925> [<https://perma.cc/8HZ2-GSC2>]; Eric Lipton & Jeremy Peters, *In Gorsuch, Conservative Activists See Test for Reshaping the Judiciary*, N.Y. TIMES (Mar. 19, 2017), [https://www.nytimes.com/2017/03/18/us/politics/neil-gorsuch-supreme-court-conservatives.html?\\_r=0](https://www.nytimes.com/2017/03/18/us/politics/neil-gorsuch-supreme-court-conservatives.html?_r=0) [<https://perma.cc/9PEL-DHZL>]; Zoe Tillman, *Why Trump Will Have to Work With the Senate, Including Democrats, To Get His Judges Confirmed*, BUZZFEED NEWS (Mar. 31, 2017), [https://www.buzzfeed.com/zoetillman/why-trump-will-have-to-work-with-democrats-to-get-his?utm\\_term=.ksdWL7nXq#.ouG1wv7QE](https://www.buzzfeed.com/zoetillman/why-trump-will-have-to-work-with-democrats-to-get-his?utm_term=.ksdWL7nXq#.ouG1wv7QE) [<https://perma.cc/A24G-CN34>].

politicians in states that presently have vacancies.<sup>155</sup> The Federalist Society has concomitantly been advising Trump, particularly on circuit openings.<sup>156</sup> Nonetheless, the administration has clearly eschewed pre-nomination dependence on American Bar Association investigations and ratings, which sharply contrasts to all Presidents since Dwight Eisenhower except George W. Bush.<sup>157</sup> Since April when the Senate confirmed Judge Neil Gorsuch to the U.S. Supreme Court, the White House has been devoting more resources to lower court nominations.<sup>158</sup>

Some pertinent administration effort has directly involved the empty Texas Fifth Circuit seats. A few press outlets stated that the President requested the FJEC to analyze six circuit aspirants, while the commission apparently evaluated the choices during February and March and finished making suggestions to Cornyn and Cruz in April.<sup>159</sup> Conservative political views are the foremost characteristic that seems to unite those six appellate

155. Tillman, *supra* note 154; see Tobias, *supra* note 28, at 2240–41. For appellate candidates, one major focus has been youth. Goldmacher, *supra* note 154; Alex Swoyer, *Conservatives Urge Trump to Use Slew of Court Vacancies to Reshape Legal System*, WASH. TIMES (Apr. 9, 2017), <http://www.washingtontimes.com/news/2017/apr/9/neil-gorsuch-confirmation-clears-donald-trump-to-r/> [<https://perma.cc/2Y8U-MUBB>].

156. Lipton & Peters, *supra* note 154; Philip Rucker & Robert Barnes, *Trump to Inherit More than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), [https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d\\_story.html](https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html) [<https://perma.cc/G7EG-7PHJ>]; see Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 17, 2017), <http://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/9EHA-9348>]; Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES (Aug. 1, 2005), <http://www.nytimes.com/2005/08/01/politics/politicsspecial1/debating-the-subtle-sway-of-the-federalist.html> [<https://perma.cc/52KY-A3DW>].

157. This is unwise, because the ABA evaluations and ratings are very professional, offer valuable insights and can save the candidates and the administration from embarrassment, should problematic revelations arise later in the process. The White House may also want to remember that the ABA accorded Chief Justice John Roberts and Associate Justices Samuel Alito and Neil Gorsuch its highest rating. Noah Feldman, *White House Ends Bar Association's Role in Vetting Judges*, BLOOMBERG VIEW (Apr. 2, 2017), <https://www.bloomberg.com/view/articles/2017-04-03/gorsuch-may-be-trump-s-last-well-qualified-judge> [<https://perma.cc/V9Q8-X3MA>]; Adam Liptak, *White House Cuts ABA Out of Judge Evaluations*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html> [<https://perma.cc/LYS3-KZEP>].

158. Adam Liptak & Matt Flegenheimer, *Court Nominee Confirmed After Bruising Yearlong Effort*, N.Y. TIMES (Apr. 8, 2018), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/G5UP-G7PA>]; see sources cited *supra* note 154.

159. John Council, *6 Candidates Trump Wants to Place on the Fifth Circuit Set for Vetting*, TEX. LAWYER (Feb. 14, 2017), <http://www.texaslawyer.com/id=1202779124278/6-Candidates-Trump-Wants-to-Place-on-the-Fifth-Circuit-Set-for-Vetting?slreturn=20170229154845> [<https://perma.cc/N8P8-6SDA>]; Diaz, *supra* note 124; Ken Klukowski, *Texas Republicans Hail Judicial Hopefuls to Fulfill Trump Promise*, BREITBART (Feb. 23, 2017), <http://www.breitbart.com/big-government/2017/02/23/exclusive-texas-republicans-hail-judicial-hopefuls-fulfill-trump-promise/> [<https://perma.cc/C3JH-EVDK>]; see *supra* note 25.

court prospects.<sup>160</sup> Because the two vacancies are protracted and classified as emergencies, they deserve considerable priority.<sup>161</sup>

If Trump actually requested that the commission assess the six prospects, Cornyn and Cruz ought to have accorded some deference to the President respecting those candidates.<sup>162</sup> The senators might have augmented the “Trump List” with other excellent choices, depending on the FJEC views of the six plus additional prospects whom it considered and the senators’ perspectives on all of the candidates. After Cornyn and Cruz reached agreement, they should have proffered their suggestions to the White House with a few picks for each open seat and reasons for prioritization. The White House in turn must carefully evaluate the recommendations and negotiate with the senators, if merited, and nominate two highly competent, mainstream nominees.

Cornyn and Cruz appear to have made a promising start on filling the district vacancies. For example, they issued a January press release which sought candidate applications by February 19.<sup>163</sup> The commission concomitantly thoroughly surveyed the applications, examined the data conveyed, interviewed numerous candidates, and tendered proposals to

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160. See Council, *supra* note 159; Klukowski, *supra* note 159.

161. This is even more compelling because there is a third emergency Fifth Circuit vacancy in Louisiana. *Judicial Emergencies*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> [<https://perma.cc/N2EC-WMNA>] (last visited Apr. 11, 2017). Recent reports suggest that there are four stronger contenders for the two vacancies but that resolution of who will receive nomination will happen soon, perhaps in September upon the Senate’s return from the August recess. Multiple observers believe that the frontrunner for one vacancy is Northern District Judge Reed O’Connor, who served as a Cornyn aide. The remaining three candidates are James Ho, who is co-chair of Gibson Dunn’s appellate practice and former Texas Solicitor General and is said to be a Cruz favorite; Andy Oldham, who is Texas Governor Greg Abbott’s Deputy General Counsel, and is said to be Abbott’s favorite; and Texas Supreme Court Justice Don Willett, who has served on the court since 2005, worked for Abbott when he was Texas Attorney General and was on Trump’s short list of twenty preferences for the U.S. Supreme Court vacancy. See Lat, *supra* note 128, at 11; David Lat, *Federal Judicial Nominations: A Quick Recap* 3, ABOVE THE LAW (Aug. 17, 2017), <http://abovethelaw.com/2017/08/federal-judicial-nominations-a-quick-recap/>; Maria Recio, *Greg Abbott Plays an Outsized Role in Filling U.S. Judicial Vacancies*, AUSTIN AM.-STATESMAN (May 14, 2017), <http://www.mystatesman.com/news/state--regional-govt--politics/greg-abbott-plays-outsized-role-filling-judicial-vacancies/e0bLMmLxHxMtCcrUibrmML/> [<https://perma.cc/N9X7-82SJ>].

162. Presidents customarily assume the lead on circuit nominations. Tobias, *supra* note 28, at 2240–41.

163. Press Release, *Cornyn, Cruz Announce Application Process for Texas Judgeships* (Jan. 23, 2017). Cornyn stated: “It’s a new administration. It’s not as if these [five nominees] will not have the opportunity to compete.” He added that “some may reapply and blamed the Obama administration for not making filling the positions a priority.” Maria Recio, *Cruz, Cornyn Slow-Play Texas Judicial Vacancies After Trump Election*, AUSTIN AM.-STATESMAN (Feb. 17, 2017), <http://www.mystatesman.com/news/state--regional-govt--politics/cruz-cornyn-slow-play-texas-judicial-vacancies-after-trump-election/ETwhHdMR4BzypVRHtvRmjJ/> [<https://perma.cc/VHU2-KNN3>]; see *supra* note 124 and accompanying text.

Cornyn and Cruz in April.<sup>164</sup> The politicians apparently promptly and cautiously scrutinized these people and directly forwarded recommendations to the White House with several prospects for every vacancy and comprehensive explanations for their rankings.

Cornyn and Cruz must have seriously considered proposing the renomination of the five 2016 district nominees who secured hearings last year for the above-documented reasons. For instance, both politicians had earlier recommended and supported the nominees, the designees' renomination would directly expedite confirmation and conserve resources and the Texas districts have critical needs for more judges.<sup>165</sup> The nominees have also undertaken career and personal sacrifices and have waited protracted times, while they did not receive confirmation for political reasons unrelated to their qualifications, which are excellent. Thus, fairness concerns suggest that the nominees deserve much consideration.

After Cornyn and Cruz tender proposals, the White House needs to carefully and promptly scrutinize them. President Trump must also seriously contemplate renominating some or all of the five well qualified, mainstream 2016 nominees for the reasons discussed above.<sup>166</sup>

Once the White House makes nominations for any of the twelve Texas circuit and district emergency vacancies and the one non-emergency opening, the President ought to cooperate with the Senate to assure prompt, comprehensive and fair confirmation processes. The Texas senators must assiduously cultivate all of their colleagues on the committee and in the chamber and educate them regarding the nominees' qualifications. The members correspondingly need to insure expeditious, thorough and fair

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164. See *supra* note 159 and accompanying text.

165. See *supra* notes 124, 135–45 and accompanying text.

166. See *supra* note 164. President Trump has already renominated 3 Obama nominees, including District of Idaho Judge David Nye, who was the first Trump district court nominee to capture appointment. Press Release, White House Office of the Press Sec'y, President Donald J. Trump Announces Judicial Candidate Nominations (May 8, 2017), <https://www.whitehouse.gov/the-press-office/2017/05/08/president-donald-j-trump-announces-judicial-candidate-nominations> [<https://perma.cc/NE6Z-3DTB>]; 163 CONG. REC. S3,935 (daily ed. July 12, 2017). The President is also seriously considering the renomination of three additional Obama nominees. See, e.g., David Lat, *The Art of the Possible: New York Nominees for Federal Judgeships and Prosecutor Posts*, ABOVE THE LAW (Aug. 8, 2017), <http://abovethelaw.com/2017/08/the-art-of-the-possible-new-york-nominees-for-federal-judgeships-and-prosecutor-posts/> [<https://perma.cc/8RSA-VKLJ>]; Andrew Seidman & Jonathan Tamari, *Trump Poised to Nominate Christie Ally for U.S. Attorney in Complex Political Deal*, PHILA. INQUIRER (Aug. 10, 2017), <http://www.philly.com/philly/news/politics/presidential/trump-poised-to-nominate-christie-ally-for-u-s-attorney-post-20170810.html> [<https://perma.cc/E2LC-6UBH>]; Zoe Tillman, *The White House Has Pitched Nominee for Manhattan's Powerful U.S. Attorney Opening*, BUZZFEED NEWS (Aug. 7, 2017), [https://www.buzzfeed.com/zoetillman/the-white-house-has-pitched-a-nominee-for-manhattans?utm\\_term=.ybxjZ9n9R#.veAW8pep3](https://www.buzzfeed.com/zoetillman/the-white-house-has-pitched-a-nominee-for-manhattans?utm_term=.ybxjZ9n9R#.veAW8pep3) [<https://perma.cc/UF6R-M3FY>].

consideration at the panel stage and on the chamber floor.<sup>167</sup>

## VI. Conclusion

Modern appointments, concretely illustrated by obstruction and procedural technicalities' employment to stall consideration, detrimentally affect federal court jurists and litigants. The vacancy crisis has profound implications for Texas. The state addresses two circuit, eleven district, and twelve emergency, openings, while a perfect solution has not been crafted. Thus, the White House and the Texas legislators must redouble their efforts to collaborate throughout the nomination and confirmation processes by swiftly filling the open positions with able, mainstream jurists, who could afford the justice that numerous Texas citizens and corporations merit.

Senators' delay and neglect of their constitutional advise-and-consent responsibilities have eroded attempts by the coequal judicial branch to fulfill its duties, especially to promptly, inexpensively and equitably resolve disputes in Texas. Accordingly, the White House, the chamber, and politicians must reject striking partisanship, slowdowns, and paybacks. Only then can Texas jurists better deliver justice for individuals and businesses litigating in federal courts.

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167. *See supra* notes 132–34, 146–47 and accompanying text.